Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

ANDRE W. AHERN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent,

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Is Petitioner entitled to relief from sentencing where the sentencing Court failed to follow 18 U.S.C. §3663(e) (1), by neglecting to offset compensation paid to the victim prior to the sentencing date, in accordance with the terms of a binding settlement agreement entered into in the United States Bankruptcy Court?

II. Is Petitioner entitled to relief from sentencing when the sentencing court failed to follow 18 U.S.C. §3663(e)(2), by neglecting to consider a potential offset for restitution purposes as it relates to the settlement agreement between the Petitioner and victim, Monthco Premium Service Company, before the U.S. Bankruptcy Court?

III. Is the Petitioner entitled to relief pursuant to 18 U.S.C. §3664, where the Court failed to make specific findings of fact as it relates to the propriety of the amount of restitution, as well as determining the petitioner's obligations, debts and ability to pay?

IV. Is Petitioner entitled to a claim for relief for ineffective assistance of counsel under 28 U.S.C. §2255, where the defense attorney failed to inform the sentencing court with vital financial information as it related to the issue of restitution?

V. Did the 7th Circuit Court of Appeals err by failing to recognize that Petitioner's request for relief under 28 U.S.C. §2255 had never been adjudicated on the merits, and therefore should have been remanded to the District Court for a hearing?

VI. Did the 7th Circuit Court of Appeal, err by failing to consider Petitioners proportionality claim as it relates to restitution, by finding that the issue was waived?

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PETITION FOR A WRIT OF CERTIORARI

Andre W. Ahern respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

United States v. Ahern, 836 F.Supp. 492 (N.D.Ill 1993)

United States v. Ahern, 863 F.Supp. 806 (N.D.Ill 1994)

Ahern v. United States, No. 93C5400, U.S. Court of Appeals for the 7th Circuit, Chicago, Illinois 60604, decided July 22, 1996 (unpublished order).

JURISDICTION

The Petitioner seeks review of the judgment of the United States Court of Appeals for the 7th Circuit. The Court entered judgment on July 22, 1996.

On October 21, 1996, Justice Stevens of the Supreme Court of the United States granted an extension of time within which to file a Petition for Writ of Certiorari, to December 7, 1996.

The United States Supreme Court has

proper jurisdiction of this matter in accordance with 28 U.S.C. Section 1254(1). This Court also has jurisdiction under the 6th Amendment to the United States Constitution on the basis of Petitioner's right to effective assistance of counsel.

The lower District Court and the Court of Appeals had jurisdiction of this matter as follows:

The U.S. District Court for the Northern District of Illinois was vested with subject matter jurisdiction under Title 28 U.S.C. 2255, where Petitioner sought post-conviction relief from a final judgment entered by that Court.

The Court of Appeals for the 7th Circuit was vested with subject matter and appellate jurisdiction under Title 28 U.S.C. 1291, where Petitioner appealed from a final judgment entered by the U.S. District Court for the District of Illinois.

STATUTORY PROVISIONS INVOLVED

With reference to the issue of criminal restitution, 18 U.S.C. §3663(e), provides that:

> (1) The Court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the Court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the

compensation.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such a victim in--

(A) any federal or civil proceeding.

All other statutory provisions cited herein are set out in Appendix B.

STATEMENT

The Petitioner, Andre Ahern, was convicted of mail fraud in violation of Title 18, United States Code, Section 1341. The United States District Court for the Northern District of Illinois, Eastern Division, sentenced Mr. Ahern on March 23, 1992. On the date of sentencing the Court ordered restitution in the amount of $1.466 million dollars. The $1.466 million dollar figure represents a serious inequity to Mr. Ahern because, for among other reasons, sentencing counsel failed to provide the court with vital information needed under 18 U.S.C. §3663(e).

The Petitioner subsequently filed several petitions pursuant to 28 U.S.C. §2255, alleging ineffective assistance of counsel for failing to provide obvious information which would have lessened the restitution amount, and challenged the restitution order itself.

After several §2255 motions, the district court denied the Petitioner's motions to vacate, set aside or correct his sentence.

Subsequently, Petitioner filed a notice of appeal with the United States Court of Appeals for a review of the lower court ruling. The Seventh Circuit affirmed the lower court.

I. Petitioner is entitled to relief from fundamental error at sentencing when the District Court where it failed to follow 18 U.S.C. §3663(E)(1) and (2) by neglecting to make a restitution offset in recognition of a binding civil settlement agreement between victim and Petitioner

Section 3663(e) provide as follows:

> (1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation...
>
> (2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in--
>
> (A) any Federal civil proceeding.

In the present case, Petitioner Ahern entered into a civil settlement agreement with Monthco Premium Services Company Inc. (hereafter "Monthco"), on July 21, 1989. Additionally, the defendant began to make

payments pursuant to the settlement agreement well in advance of being indicted and sentenced. The plea agreement which Petitioner entered into on December 10, 1991, explicitly stated that the court would consider the factors in 18 U.S.C. §§3663, 3664. See excerpt from plea agreement, Appendix C, Exhibit 4.

The district court committed "fundamental error" by failing to do the following:

1) The court failed to apply any payments that Petitioner had made to Monthco prior to being sentenced in violation of §3663(e)(1). There was a settlement agreement reached by Petitioner and Monthco in 1989. The court also failed to consider these factors in accordance with Petitioner's plea agreement.

2) The district court failed to make a proper fact finding with respect to the potential restitution offset that is presented by the settlement agreement between Petitioner and Monthco, in violation of §3663(e)(2).

In U.S. v. Bruchey, 810 F.2d 456 (4th Cir.1987), the Court recognized the need for fact findings in restitution orders. The court noted that section 3579(e)(1)(now embodied in 18 U.S.C. Sec. 3663(e)(1)) that the "court cannot impose restitution for a loss 'for which the victim has received or is to receive compensation.'" The Bruchey Court recognized a clear obligation to offset restitution as well as to offset the total amount to be received in the future.

In the present case, the District Court did not apply any offsets for payments that had been made by the Petitioner. Even though the Court made an attempt to do so when prompted by the Assistant U.S. Attorney, the sentencing transcript reveals that nothing was done on this issue. See sentencing transcript Appendix C, Exhibit 3.

In this particular case, Monthco was going to receive a total of $102,000 of the $489,961.06 in damages in accordance with a civil settlement agreement that was entered on or about July 21, 1989, in the U.S. Bankruptcy Court for the Northern District of Illinois. See excerpt from settlement agreement in Appendix C, Exhibit 1.

The Petitioner contends that 18 U.S.C. §3663(e)(2), requires the district court to take into consideration the Monthco settlement figure when determining restitution. This did not occur at the Petitioner's sentencing by the district court.

The presentence report acknowledged the settlement agreement with Monthco as well as the payments that were being made to Monthco. See excerpt from presentence report in Appendix C, Exhibit 2. However, the report failed to advise the court of the exact figures to be used to offset restitution and it failed to advise the court of the settlement amount that had been agreed to concerning the compensation that was to be received by Monthco.

Additionally, at sentencing, both the Assistant United States Attorney and the

district court recognized the need to consider the settlement agreement and the amounts paid thereon. See excerpt from transcript of sentencing hearing, Appendix C, Exhibit 3.

Although recognizing the need to apply the settlement agreement and any payments thereon, the court failed to implement the appropriate monetary figures in the restitution order. A review of the transcript reveals that the court did not follow through on considering or implementing a partial restitution amount in accordance with Section 3663(e) because it did not have the information it needed. See Appendix C, Exhibit 3. Petitioner contends that the court's failure to comply with section 3663(e) constitutes "fundamental error".

A series of other problems developed with regard to the court's failure to make findings of fact pursuant to 18 U.S.C. §3664(a). The district court was under the impression that there was no need for findings of fact because the court had ordered full restitution. The district court relied on the holding in U.S. v. Ahmad, 2 F.3d 245 (1993). In Ahmad, the Court of Appeals for the Seventh Circuit held that there is no need for expressed findings of fact, where full restitution is ordered by the court.

The err committed by the district court and not corrected by the U.S. Court of Appeals for the Seventh Circuit, was that only partial restitution should have ordered in accordance with 18 U.S.C. §3663(e)(1), as

discussed above. Therefore, findings of fact should have occurred at the district court level according to Ahmad, supra.

Petitioner contends that the error arose from confusion that is evidenced by a split among the various circuits on whether or not findings of fact are required in accordance with 18 U.S.C. §3664(a). There are eight circuits which have addressed the question whether reasons must be assigned in those instances in which full restitution is ordered. Three require factual findings; four do not. Those courts of appeals requiring expressed findings are: United States v. Bailey, 975 F2.d 1028, 1031 (4th Cir.1992); United State v. Logar, 975 F2.d 958, 961 (3rd Cir.1992); United States v. Hill, 798 F2.d 402, 406-07 (10th Cir.1986). Those jurisdictions not requiring expressed findings are: United States v. Ahmad, 2 F3.d 245 (7th Cir.1993); United States v. Purter, 823 F2.d 965 (6th Cir.1987); United States v. Atkinson, 788 F2.d 900 (2nd Cir.1986).

Interestingly, the 5th Circuit has taken a hybrid approach. In United States v. Patterson, 837 F2.d 182, 183- 184 (5th Cir.1988), the court held as follows:

> We take a middle course. We are not persuaded that the district court must spread its findings and conclusions on the record in every case in which full restitution is ordered. The decision to assign reasons is committed to the sound discretion of the district court, guided by the singular inquiry --

> absent an assignment of its reasons, does the record contain sufficient data for the appellate court to perform its mandated review? If the record provides an adequate basis for that review, the court need not assign specific reasons for its decision to order full restitution. If the record is insufficient, reasons must be assigned.

Had the district court reviewed the sentencing record utilizing the Patterson approach, it would have been clear that the record was insufficient with respect to the necessary facts needed to determine whether full restitution was appropriate. As the record indicates, several factors were lacking. At sentencing, the parties brought up the issue of previous compensation to the victim as well as the settlement agreement. The sentencing proceeding is totally void of any facts upon which full restitution can be ordered. See Appendix C, Exhibit 3. Since the court was aware of the necessary set off for previous payments as well as the settlement agreement, and the court acknowledged on the record that it wished to consider those factors, it ultimately, never did. Since the record was not complete, the matter should have been remanded by the 7th Circuit Court of Appeals for a clarification on the restitution issues.

The sentencing record at the district court level was evidenced that partial restitution would have been appropriate. The district court's reliance on Ahmad, supra, therefore, was inappropriate since

the district court in its ruling completely forgot about the fact that there were previous payments and a settlement agreement. Even on the issue of previous payments alone, let alone future payments under the settlement agreement with Monthco, something less than full restitution would have been appropriate.

Since something less than full restitution needed to be ordered, the analysis of Ahmad, which purportedly does not require specific findings, is not applicable. Since the original restitution order should have been for an amount less than full restitution, the district court should have provided specific findings of fact as it relates to the application of 18 U.S.C §3663 as well as §3664(a).

Additionally, Petitioner contends that 18 U.S.C. §3664, requires the court to make specific findings of fact as it relates to the propriety of the amount of restitution, as well as determining the Petitioner's obligations, debts, and ability to pay.

Furthermore, defense counsel did not adequately provide vital information concerning restitution issues (i.e. amount of payments made by Petitioner prior to sentencing, amount of settlement agreement between Petitioner and Monthco). Petitioner contends that defense counsel's inaction on this issue rises to the level of ineffective assistance of counsel in accordance with Strickland v. Washington, 466 U.S. 668 (1984). See discussion below.

II. Petitioner is entitled to relief under 28 U.S.C. §2255 on the basis of ineffective assistance of counsel because "Cause" and "Prejudice" exist.

Petitioner is entitled to relief from ineffective assistance of counsel even though he did not raise ineffective assistance of counsel on direct appeal, but instead raised it in a §2255 motion. Under U.S. v. Frady, 456 U.S. 152 (1982), an argument that was not presented on direct appeal cannot first be advanced on collateral review absent a showing of (1) "cause" for the failure to advance the argument sooner; and (2) "actual prejudice" resulting from the alleged constitutional violations. Frady at 1112.

In Murray v. Carrier, 477 U.S. 478, 488 (1986), the Court held that ineffective assistance of counsel constitutes sufficient "cause" for the failure to raise an issue. See also Baumann v. United States, 692 F.2d 565, 572 (9th Cir.1982).

In U.S. v. De La Fuente, 8 F.3rd 1333 (9th Cir.1993), the Court specifically held that ineffective assistance of counsel at time of sentencing constituted "cause" and "prejudice" for failure to raise a challenge prior to collateral review. De La Fuente involved an attorney who failed to bring to the court's attention, at the time of sentencing, the governments breach of a plea agreement by not moving for a sentence below the mandatory minimum on the basis of the defendant's cooperation. Mr. De La Fuente obtained new counsel and that counsel moved under 28 U.S.C. §2255 to vacate or correct

De La Fuente's sentence on the basis of, among other things, ineffective assistance of counsel. Id. at 1335-36.

The De La Fuente Court held that "cause" and "prejudice" existed because there was no tactical reason for the attorney who was present at sentencing not to call to the court's attention the government's failure to ask for a sentence below the mandatory minimum in accordance with the plea agreement.

Similarly, there could be no reason for the attorney who was present at the time of Petitioner's sentencing not to bring out the fact that Petitioner had made compensation payments to Monthco and had a settlement agreement in place with the same organization. Moreover, as noted in Section I above, Petitioner had entered into a civil settlement agreement with Monthco prior to the time of sentencing. See Appendix C, Exhibit 1. Although the Assistant United States Attorney, the Sentencing Court (See Appendix C, Exhibit 3), Petitioner's Probation Officer (See Exhibit 2) and Petitioner's own attorney (Jeffrey Urdangen) were aware of this at the time of sentencing, Petitioners own attorney never provided any data to the court concerning compensation payments made, nor any information regarding the settlement agreement with Monthco. See transcript of sentencing hearing, Appendix C, Exhibit 3. This is the first and last time that we hear anything from defense counsel during the sentencing process as it relates to compensation paid to Monthco and/or the settlement agreement with Monthco. This was

also in violation of Petitioner's plea agreement. See Appendix C, Exhibit 4.

Ineffective assistance of counsel claims typically require the development of facts outside the trial record which are not only unlikely to be discovered on direct appeal, but typically will not even be recognizable in the proceeding. Clak v. U.S., 59 F.3rd 296, 304-309 (2nd Cir 1995). However, in Petitioner's case there is a record, i.e., the transcript of the sentencing hearing which shows that Petitioner's attorney failed to provide vital information to the Court though seemingly prompted to do so. See excerpt from transcript of sentencing hearing, Appendix C, Exhibit 3.

Thus, the Court should have granted Petitioner the opportunity of a hearing in light of the evidence of gross neglect by Petitioner's original attorney at the time of sentencing.

III. Petitioner's §2255 ineffective assistance of counsel claim arose from a "miscarriage of justice" which justifies relief.

Relief under 28 U.S.C. §2255 is available for errors of constitutional or jurisdictional magnitude or where the error represents a "fundamental defect which inherently results in a complete miscarriage of justice." Kelly v. U.S., 29 F.3rd 1107, 1112 (7th Cir. 1994) Citing Bellford v. U.S., 975 F2.d 310, 313 (7th Cir. 1992).

As noted in Section I above, a

fundamental error first occurred when the District Court failed to consider and implement an offset in accordance with 18 U.S.C. 3663(e). This error occurred because sentencing counsel failed to provide restitution data to the Court. Petitioner's probation officer knew that Petitioner had begun repaying Monthco pursuant to a civil settlement agreement. See Appendix C, Exhibit 2. Therefore, sentencing counsel also should have known.

As a result of sentencing, counsel's ineffective representation, Petitioner was ordered to pay $1.466 million, an amount of restitution which far exceeded a fair and proper restitution amount. The proper amount of restitution should have factored in the previous compensation payments made by Petitioner to Monthco, as well as those payments to be made in the future under the settlement agreement, in accordance with §3663(e). Petitioner bargained for this in his plea agreement. See Appendix C, Exhibit 4. As a result of counsel's ineffective representation, a complete "miscarriage of justice" arguably occurred.

IV. Petitioner is entitled to relief under 28 U.S.C. §2255 since his case was never decided on the merits.

In this case, the District Court held that Petitioner's subsequent Section 2255 motion was not "proper grist for a Section 2255 mill," U.S. v. Ahern, 863 F.Supp. 806, 811 (N.D.Ill 1994), or that the subsequent motion was an abuse of the writ. However, where a motion is dismissed merely because the movant has not presented adequate

substantiation of his claim to cross the "threshold of plausibility," the filing of a successive motion cannot be barred as an abuse of the writ because there has not yet been a determination on the merits. The Supreme Court has held that the denial of a §2255 motion "because it stated only bald legal conclusions with no supporting factual allegations ... was not on the merits." Sanders v. U.S., 373 U.S. 1,19 (1963).

It is not an abuse to file a successive petition, if a previous petition, or petitions were not denied on the merits. Dellenbach v. Hanks, 76 F.3rd 820, 822 (7th Cir. 1966). If the petition alleges facts that if proved, would establish the petitioners entitlement to relief, it cannot properly be dismissed under Rule 4 of the rules governing 28 U.S.C. Section 2255 motions. Id.

In Price v. Johnston, 334 U.S. 266 (1948), a similarly related case, a federal prisoner who, though not a lawyer, prepared three unsuccessful habeas corpus writs, and on the fourth application, eight years after conviction, alleged for the first time that his conviction had been obtained by testimony known by the prosecutor to be false. The District Court denied the fourth petition because it thought that the matter was known to petitioner at the time of filing his former petitions and should have been urged at that time.

The Circuit Court of Appeals held that petitioner had no valid excuse for failing to present, in his earlier petitions, the ground for his present petition, and that

the District Court did not abuse its discretion in denying such a petition without rehearing.

The United State Supreme Court held that it was not necessary that the petitioner allege some excuse for not making his allegation earlier and that the petitioner was entitled to have his case heard on the merits.

Likewise, Petitioner's case should be heard on the merits.

The court's summary dismissal in U.S. v Ahern, 836 F.Supp 492 (1993) did not constitute an adjudication on the merits. Thus, the Court's claim that Petitioner made an abuse of the writ in the subsequent connected case, was incorrect. Significantly, Petitioner has never had the opportunity of a hearing to explain the basis of his claims.

Rule 9(1) of the rules governing section 2255 proceedings requires that a second or successive motion may be dismissed if: 1) the judge finds that it fails to allege new or different grounds for relief; and 2) the prior determination was on the merits. Neither of these two criteria were met by the district court, nor was Rule 9(B) even noted in the courts decision. There was an incorrect assumption by the district court that Petitioner's previous motions were ruled upon the merits. This never occurred.

With regard to one of Petitioners §2255 motions which was dismissed by the district

court in an October 22, 1993 ruling, the petitioner submitted a motion for reconsideration on September 17, 1993. Several days later on September 23, 1993, the court entered an order denying the Petitioner's motion. Subsequently, on October 12, 1993, petitioner filed a 31 page memorandum, in support of his September 17, 1993, Motion for Reconsideration. This memorandum raised plausible arguments regarding ineffective assistance of counsel. However, the court's October 22, 1993, opinion indicates that the court never reviewed the new materials that were submitted on October 12, 1993. The court stated as follows:

> ...but in all events, this matter has been at an end since this court ruled on the motion for reconsideration a month ago.

In light of the requirements of Rule 4(b), Rules Governing §2255 proceedings in the United States District Court, the court did not follow the spirit of the rule because it failed to examine newly provided information.

The United States District Court, in U.S. v. Ahern, 863 F.Supp. 806 (N.D.Ill 1994), never reviewed the record sufficiently to catch the obvious error in sentencing as it relates to the factors in 18 U.S.C. §§3663 and 3664. The 7th Circuit Court of Appeals also erred and failed to address these issues.

Thus, no adjudication on the merits has ever taken place. The failure of the court

to rule on the merits has violated the defendant's right to due process of law under the 14th Amendment of the United States Constitution. Therefore, the Court of Appeals should be reversed so that this case can be heard on the merits.

V. The 7th Circuit Court of Appeals erred when it failed to grant Petitioner's prayer for relief as it relates to the disparity in sentencing between Appellant and a more culpable party.

Despite the basic need for appellate deference to trial court sentencing, the sentencing process is not free from close appellate scrutiny. Appellate courts must carefully examine the process by which punishment is imposed even while deferring to the trial judge's ultimate sentencing decision. U.S. v. Bruchey, 810 F.2d 456, 458 (4th Cir. 1987). United States v. Sparrow, 673 F.2d 862, 864 (5th Cir. 1982).

The 7th Circuit Court of Appeals erred when the Court determined that Petitioner had waived the argument that his sentenced was disproportionally harsh in comparison to that of another defendant. The court never had the opportunity to decide the case on its merits, but instead, based its decision on the issue of Petitioner's waiver. The 7th Circuit bases its contention that waiver of this issue occurred on the strength of a civil case. Citizens Inc. Co. of America v. Barton, 39 F.3d 826, 828 (7th Cir.1994). See Appendix A, Exhibit 1.

The court should have considered whether a claim of disparity of sentencing

is appropriate under 28 U.S.C. §2255. Additionally, the relief could have been granted in light of sentencing defense counsel's ineffective assistance at the time of sentencing. The sentencing record reflects that defense counsel did not raise this issue in any manner, at sentencing.

Furthermore, the 7th Circuit Court of Appeals erred by applying the waiver rule against the Petitioner, who was acting on his own behalf in his initial §2255 motion. Both the district and appellate courts did not make adequate inquiry as to why the defendant failed to pursue this issue on direct appeal versus a §2255 motion. Based on the previous commentary made concerning the lack of sentencing counsel's effectiveness, it is clear to see that this issue was missed right along with the others noted in this memorandum.

In Poor Thunder v. United States, 810 F2.d 817 (8th Cir.1987), the court was unwilling to apply doctrines of procedural default with full rigor against litigants without lawyers. Since the Petitioner acted pro se in the filing of his §2255 motion, the Court of Appeals should have considered the argument raised by the Petitioner in his appeal to the appellate court. To preclude the Petitioner's ability to do so on the strict interpretation of a civil rule seems patently unjust and unfairly conclusive.

For all of the foregoing reasons, the Appellate Court erred.

REASONS FOR GRANTING THE PETITION

I. The circuit courts are split as to whether 18 U.S.C. §3664 (a), requires the sentencing court to make specific finding of fact when full restitution is ordered.

Petitioner contends that error arose in the sentencing proceeding from confusion that is evidenced by a split among the various circuits on whether or not findings of fact are required in accordance with 18 U.S.C. §3664(a). There are eight circuits which have addressed the question whether findings of fact must be assigned in those instances in which full restitution is ordered. Three require factual findings; three do not. Those courts of appeals requiring expressed findings are: United States v. Bailey, 975 F2.d 1028, 1031 (4th Cir.1992); United State v. Logar, 975 F2.d 958, 961 (3rd Cir.1992); United States v. Hill, 798 F2.d 402, 406-07 (10th Cir.1986). Those jurisdictions not requiring expressed findings are: United States v. Ahmad, 2 F3.d 245 (7th Cir.1993); United States v. Purter, 823 F2.d 965 (6th Cir.1987); United States v. Atkinson, 788 F2.d 900 (2nd Cir.1986).

Interestingly, the 5th Circuit has taken a hybrid approach. In United States v. Patterson, 837 F2.d 182, 183- 184 (5th Cir.1988), the court held as follows:

> We take a middle course. We are not persuaded that the district court must spread its findings and conclusions on the record in every case in which full

> restitution is ordered. The decision to assign reasons is committed to the sound discretion of the district court, guided by the singular inquiry -- absent an assignment of its reasons, does the record contain sufficient data for the appellate court to perform its mandated review? If the record provides an adequate basis for that review, the court need not assign specific reasons for its decision to order full restitution. If the record is insufficient, reasons must be assigned.

Had the district court reviewed the sentencing record utilizing the Patterson approach, it would have been clear that the record was insufficient with respect to the necessary facts needed to determine whether full restitution was appropriate. As the record indicates, several factors were lacking. At sentencing, the parties brought up the issue of previous compensation to the victim as well as the settlement agreement. See Appendix C, Exhibit 3, page 32, lines 20-25, page 33, lines 1-6. The sentencing proceeding is totally void of any facts upon which full restitution can be ordered. Since the court was aware of the necessary set off for previous payments as well as the settlement agreement, and the court acknowledged on the record that it wished to consider those factors, it ultimately, never did. Since the record was not complete, the matter should have been remanded by the 7th Circuit Court of Appeals for a clarification on the restitution issues.

The sentencing record, at the district

court level, evidenced that partial restitution would have been appropriate. The district court's reliance on Ahmad, supra, as to the issue of full restitution, was inappropriate, since the district court in its ruling completely forgot about the fact that there were previous payments along with a settlement agreement. Even on the issue of previous payments alone, let alone future payments under the settlement agreement with Monthco, something less than full restitution would have been appropriate.

Since something less than full restitution needed to be ordered, the analysis of Ahmad, which purportedly does not require specific findings, is not applicable. Since the original restitution order should have been for an amount less than full restitution, the district court should have provided specific findings of fact as it relates to the application of 18 U.S.C §3663 as well as §3664(a). The Seventh Circuit Court of Appeals erred by failing to remand on the issue of requiring specific findings of fact.

Petitioner's case involves a situation where the district court failed to make factual findings where full restitution was ordered. This issue makes it ripe for the United States Supreme Court to clarify the application of 18 U.S.C. §3663 and 3664 and resolve the split amongst the various split circuits.

II. Petitioner's case was never decided on the merits.

III. Since cause and prejudice existed with regard to Petitioner's ineffective assistance of counsel claim under 28 U.S.C. §2255, which the court's below failed to consider, Petitioner's Petition for Writ of Certiorari should be granted.

III. Petitioner's §2255 ineffective assistance of counsel claim arose from a miscarriage of justice at sentencing which justifies relief.

IV. The Petitioner's claim for proportionality review as it relates to the issue of the amount of restitution ordered, needs to be resolved, since it has never been reviewed on the merits.

V. The 7th Circuit clearly erred by holding that Petitioner was not entitled to relief under 28 U.S.C. §2255, since it failed to recognize from the record below that Petitioner's claim had never been decided on the merits.

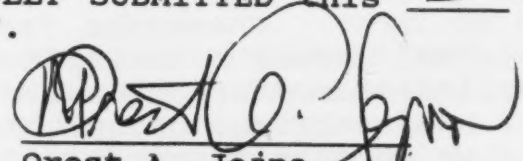
VI. Confusion appears to exist in the opinions below, with regard to whether or not a subsequent 28 U.S.C. §2255 motion is successive where previous motions were never decided on the merits. Such subsequent motions clearly are not successive nor do they constitute an abuse of the writ.

VII. On the basis of Rule 4(b), the District Court never reviewed Petitioner's October 12, 1993 memorandum in support of Movant's Section 2255 motion.

CONCLUSION

For all of the foregoing reasons, the Court should grant Petitioner's Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED this 3 day of March, 1997.



Orest A. Jejna
Attorney for Petitioner
318 W. Roosevelt Street
Phoenix, Arizona 85003
(602) 254-3872

APPENDICES

APPENDIX A

INDEX TO APPENDIX A

Exhibit 1)	Decision - U.S. Court of Appeals (7th Cir.)
Exhibit 2)	Memorandum Opinion and Order District Court (October 22, 1993)

EXHIBIT 1

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Submitted July 19, 1996*

Decided July 22, 1996

Before

Hon. Richard A. Posner, Chief Judge

Hon Ilana Diamond Rovner, Circuit Judge

Hon Terence T. Evans, Circuit Judge

ANDRE W. AHERN, Petitioner-Appellant	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 95-1203 v.	No. 93 C 5400
UNITED STATES OF AMERICA, Respondent-Appellee.	Milton I. Shadur, Judge.

ORDER

Andre W. Ahern, pro se, seeks relief from an order of restitution in the amount of $1.466 million, imposed as part of his sentence for mail fraud. 28 U.S.C. §255. Ahern argues that the sentencing court lacked an appropriate factual basis

accurately to determine the proper amount of restitution; that his counsel was ineffective for not making these facts clear

* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that the parties could file a "State as to Need of Oral Argument." See Fed. R. App. P. 34(a); Cir. R. 34(f). Petitioner-Appellant Ahern filed a statement requesting oral argument. Upon consideration of that statement, the briefs, and the record, we deny the request. Accordingly, the appeal is submitted on the briefs and the record to the sentencing court; and that the original restitution order was improper because the district court never made factual findings that Ahern had the means to make restitution in the amount ordered. The district court ruled that to the extent the petition presented a constitutional issue at all, it must be dismissed as successive.[1]

---

[1] On April 24, 1996, during the pendency of this appeal, the President signed into law the "Antiterrorism and Effective Death Penalty Act of 1996." (Pub. L. 104-132, 110 Stat. 1214.) Title I of this Act significantly curtails the scope of federal collateral review. We need not decide in this case to what extent the amendments in the act apply to petitions pending when the Act was signed into law, because even under the more expansive scope of review permitted prior to the Act, the Appellant in this case

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[1] (...continued)

would not have been entitled to relief.

Ahern pleaded guilty to mail fraud. The plea agreement stipulated that the losses from his fraudulent activities could amount to $1.466 million. At sentencing Ahern, who was represented by counsel, raised several factual objections to the Probation Department's Presentence Investigative Report ("PSR"). The PSR was changed accordingly. The district court sentenced Ahern to thirty-six months in jail, and ordered restitution of the entire $1.466 million. Ahern, represented by different counsel, then sought to reduce his sentence. The district court reduced the custodial portion of the sentence to twenty-seven months, but left the restitutive portion intact. Ahern next filed a pro se motion under 28 U.S.C. §2255, seeking to vacate his sentence on the ground that his original counsel was ineffective. The district court denied the motion, as well as a motion for reconsideration. 836 F. Supp. 492 (N.D. Ill. 1993); Nos 93 C 5400/91 CR 948, 1993 WL 388695 (N.D. Ill. Sept. 23, 1993). The instant petition followed.

To the extent that Ahern seeks to present factual issues pertaining to the accuracy of his original sentence, his petition is beyond the scope of federal

collateral review.[2]

Kelly v. United States, 29 F.3d 1107, 1112 (7th Cir.1994); see also United States v. Tucker, 404 U.S. 442, 447 (1972). The record makes clear that Ahern received all the process due to him. Basile v. United Stats, 999 F.2d 274, 277 (7th Cir.1993); 28 U.S.C. §2255, Rule 4(b). And to the extent that he seeks to claim ineffective assistance of counsel, the district court correctly ruled that Ahern is not entitled to assert once again a claim already raised and decided on the merits in a previous, unsuccessful petition for federal collateral review. 28 U.S.C. §2244(a); Dellenbach v. Hanks. 76 F.3d 820, 822-23 (7th Cir.1996).

Finally, even if it were cognizable on collateral review, Ahern has waived the argument that his sentence is disproportionately harsh in comparison to that of another defendant sentenced for the same fraudulent actions by not raising it in the district court. Citizens Inc. Co. of America v. Barton. 39 F.3d 826, 828 (7th Cir.1994).

AFFIRMED.

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[2] As noted above, Ahern stipulated in his plea agreement that the losses from his fraudulent activities could amount to $1.466 million. "[P]lea agreements are contracts, albeit unique contracts in which special due process concerns for fairness and the adequacy of procedural safeguards obtain," United States v. Sandles, 80 F.3d 1145, 1147

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[2] (...continued)

(7th Cir.1996) (internal quotation omitted), and stipulations in a plea agreement bind the parties to the agreement. Id. And the fact that a defendant at the time of sentencing may not have the means to make restitution need not preclude a court from ordering restitution in full, as long as there is some likelihood that he will acquire such means in the future. United States v. Ross, 77 F.3d 1524, 1552 (7th Cir.1996). In the case at bar, the district court explicitly found that Ahern's work history made it likely that he could acquire the means to make restitution after his release from jail.

EXHIBIT 2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 93 C 5400
	)	
ANDRE W. AHERN,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On this Court's return to chambers following a short vacation, it found among the accumulated filings in the cases on its calendar a 1-1/2-inch-thick set of documents from Andre Ahern ("Ahern"), comprising of 31-page Memorandum in Support of Movant's Section 2255 Motion plus 24 exhibits of varying degrees of bulk. Ahern says in the INTRODUCTION section with which he begins that Memorandum:

> Andre W. Ahern, hereinafter referred to as "movant," submitted the instant Section 2255 Motion to this Court, on, or about, September 1, 1993, seeking to vacate the restitution order of March 23, 1992. On, or about, September 7, 1993, this Court, sua sponte, summarily dismissed movant's Motion to Vacate,

> Set Aside or Correct his sentence. On, or about, September 17, 1993, movant submitted a motion for reconsideration of this Court's summary dismissal, however, to date movant has not received any response.

That last sentence is puzzling, for this Court in fact acted promptly in response to Ahern's motion for reconsideration (which was received in the Clerk's Office of this District court on September 20) --on September 23, 1993, it issued a memorandum opinion and order denying that motion.

It is of course the Clerk's Office and not this Court's in-chambers personnel that handles the transmittal of judicial opinions and orders to the litigants, so this Court has no way of knowing whether Ahern did or did not receive a copy of the September 23 memorandum opinion and order or, if not, why not. As a matter of courtesy, this Court's minute clerk is mailing a copy of this opinion as well as a copy of the September 23 memorandum opinion and order directly to Ahern. But in all events this matter has been at an end since this Court ruled on the motion for reconsideration a month ago.

signed
Milton I. Shadur
Senior United States
District Judge

Date: October 22, 1993

APPENDIX B

INDEX TO APPENDIX B

Exhibit 1)	18 U.S.C. §3663(e)(1)(2)(A)
Exhibit 2)	18 U.S.C. §3664(a)(b)(c)(d)
Exhibit 3)	28 U.S.C. §1254(1)
Exhibit 4)	Rule 4(a)(b) of the Rules Governing 28 U.S.C. §2255 for District Courts
Exhibit 5)	Rule 9(b) of the Rules Governing 28 U.S.C. §2255 for District Courts
Exhibit 6)	6th Amendment to the United States Constitution
Exhibit 7)	14th Amendment to the United States Constitution

EXHIBIT 1

U.S.C. §3663(e), provides that:

> (1) The Court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the Court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation.
>
> (2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such a victim ....
>
> (A) any Federal civil proceeding.

EXHIBIT 2

§3664. Procedure for issuing order of restitution

(a) The court, in determining whether to order restitution under section 3579 [3663] of this title and the amount of such restitution, shall consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence or other report pertaining to the matters described in subsection (a) of this section.

(d) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. the burden of demonstrating the financial resources of the defendant and the financial needs of the defendant and such defendant's dependents shall be on the defendant. The burden of demonstrating such

other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

EXHIBIT 3

§1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

EXHIBIT 4

RULES GOVERNING §2255 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS

Rule 4. Preliminary Consideration by Judge

(a) Reference to judge; dismissal or order to answer

The original motion shall be presented promptly to the judge of the district court who presided at the movant's trial and sentenced him, or, if the judge who imposed sentence was not the trial judge, then it shall go to the judge who was in charge of that part of the proceedings being attacked by the movant. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge of the district in accordance with the procedure of the court for the assignment of its business.

(b) Initial consideration by judge

The motion, together with all the files, records, transcripts, and correspondence relating to the judgment under attack, shall be examined promptly by the judge to who it is assigned. If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer

or other pleading within the period of time fixed by the court or to take such other action as the judge deems appropriate.

§2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court

shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

The appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

EXHIBIT 5

Rule 9. Delayed or Successive Motions

(b) Successive motions

A second or successive motion may be dismissed if the judge find that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

(as amended Pub. L. 94-426, §2(9), (10), Sept. 28, 1976, 90 Stat. 1335.)

EXHIBIT 6

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

EXHIBIT 7

AMENDMENT XIV

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within it jurisdictional the equal protection of the laws.

Representative shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representative in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

No person shall be a Senator or Representative in Congress, or elector of

President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

The Congress shall have power to enforce, by appropriate legislation, the provision of this article.

APPENDIX C

INDEX TO APPENDIX C

Exhibit 1)	Excerpt from the Settlement Agreement;
Exhibit 2)	Excerpt from the Probation Officer's Report;
Exhibit 3)	Excerpt from the Transcript of Sentencing;
Exhibit 4)	Excerpt from the Plea Agreement dated 12/10/91;

EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In Re: ANDRE W. AHERN, Debtor. ---------- MONTHCO PREMIUM SERVICE CO., a a Delaware Corporation, Plaintiff, v. ANDRE W. AHERN, FINANCIAL ASSURANCE CONSULTANTS, INC., FRANK A. CRAMSIE, INC and L. JUDSON TODHUNTER, interim trustee of the Estate of Andre W. Ahern, Defendants.	Case No. 88 B 03972 Judge Eugene R. Wedoff Adv. No. 88A0370

SETTLEMENT AGREEMENT

* * *

WHEREAS, Monthco prayed for damages in the Adversary in an amount in excess of $489,961.06;

* * *

WHEREAS, Monthco has agreed to compromise and settle any and all claims and actions in the Adversary and all other claims and actions against Ahern, the Ahern Related Entities, ~~Ahern's sureties and all sureties of the Ahern Related Entities and~~ to dismiss the Adversary with prejudice by accepting the sum of ($102,000.00) in accordance with the installment provisions and terms and conditions set forth herein....

EXHIBIT 2

UNITED STATES DISTRICT COURT
Office of the Chief Probation Officer
Northern District of Illinois
Room 1100 - U.S. Court House
Chicago, Illinois 60604

Honorable Milton I. Shadur March 25, 1992

STATEMENT OF CORRECTION

RE: AHERN, Andre
Docket No: 91 CR 948-1
Disposition Date: March 23, 1992

==========

* * *

Note B: The defendant filed for bankruptcy in Chicago, Illinois, and was discharged of debtors under Chapter 7 on April 12, 1989. Currently, $27,000 is owed to the Internal Revenue Service.

Note C: Mr. Ahern settled civilly with Monthco Premium Service for the expressed amount.

* * *

Although the defendant has admitted responsibility for his actions and has begun repaying the loss in the scheme, the undersigned finds the instant offense to be serious in nature.

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THE UNITED STATES OF AMERICA, Plaintiff,	)	DOCKET NO. 91CR 948
vs.	)	
ANDRE AHERN Defendants.	)	Chicago, Illinois March 23, 1992 1:30 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE **MILTON I. SHADUR**, Judge

APPEARANCES:

For the Plaintiff:

MR. MATTHEW BETTENHAUSEN

For the Defendant:

MR. JEFFREY URDANGEN

JESSE ANDREWS
Official Court Reporter - U.S. District Court
219 S. Dearborn Street
Chicago, Illinois 60604
(312) 435-6899

* * *

MR. BETTENHAUSEN: Judge, one other thing that I would like to discuss with restitution. One presumes that your order, of course, takes into account any of those amounts paid by settlement or that have been paid back to these individuals?

THE COURT: Sure.

MR. BETTENHAUSEN: For example, Mr. Ahern has made some money.

THE COURT: Yes. That should say "Less any payments previously made," and I don't know what that number is.

MR. BETTENHAUSEN: In addition, under 3663 and 3664, your Honor must make a finding of some ability to pay.

THE COURT: Well, there is a problem with that. You know there are a couple of opinions from our Court of Appeals that Judge Coffey has authored that suggest a different reading of Federal Rule of Criminal Procedure 32.1 than I think everybody else has had, but one by which I believe I am bound. And that is, it says that absent a current determination based on current ability to pay and currently anticipated income, it is not proper for the Court to set a schedule of payments, something that we also used to do. And what those opinions suggest is that when it becomes determined what the defendant is in a position to pay, it's proper for the government to come in under Rule 32.1 and at that point to move for the establishment of a schedule. Now you can search 32.1 all you wish, and that's your determination. All I

am telling you is that's what the cases have said.

Now I know Judge Bauer has issued an opinion that looks in somewhat a different direction, but only in dictum. And therefore my pattern has been to make a finding of the proper amount of the restitution, which I have done. I've made a provision that whatever payments -- as to the application of whatever payments are made, but I have with malice aforethought excluded any specific provision for a schedule of payments. I don't think I am in a position to make it where Mr. Ahern's situation, as I read this, is that he would have spendable or applicable income of his income level were to continue, but it's not going to continue because he is going to continue because he is going to be in durance vile.

Now maybe I should add one thing because you have raised the issue. This is not part of my order, because I haven't set a schedule. But I will tell you that my view of the financial statement, as presented, is that it reflects a continued manner of living that I think is not consistent with the obligation of restitution of this very heavy amount. It does not seem to me either that a nearly $1,500-a-month residence for rental purposes, or -- what it is -- a $500-a-month car rental is something that jibes with that. But I am not about to rule on that, because I am not ruling on the appropriate schedule. It would be time enough as and when the government may come in on that motion.

MR. BETTENHAUSEN: If I can have just one moment?

THE COURT: Yes.
(Pause)

MR. BETTENHAUSEN: Judge, there may be on other issue that we will discuss with your clerk concerning the restitution, and your Honor, if it should be added to it. The Bureau of Prisons has a program -- a restitution program -- that's done while they are incarcerated.

THE COURT: Yes.

MR. BETTENHAUSEN: And that does count toward credit with the Parole Commission as well.

THE COURT: Yes. Right. and that of course, you know what they apply they apply. Okay?

MR. BETTENHAUSEN: Thank you, your Honor.

THE COURT: Thank you very much.

MR. URDANGEN: Thank you, your Honor.
(WHICH WERE ALL OF THE PROCEEDINGS HAD AT THE HEARING OF THE ABOVE-ENTITLED CAUSE ON THE DAY AND DATE AFORESAID.)

C E R T I F I C A T E

I HEREBY CERTIFY that the foregoing is a true and correct transcript from the

report of proceedings in the above-entitled cause.

_____

JESSE ANDREWS, CSR
OFFICIAL COURT REPORTER
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
DATED: August 17, 1994

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 91 CR 948
	)	Judge Shadur
ANDRE W. AHERN	)	

PLEA AGREEMENT

* * *

15. The parties agree that the amount of restitution which the defendant could be ordered to pay to Monthco, TIFCO, and Casualty Insurance Company, if able, is $1,466,000. The defendant understands that Title 18, United States Code, Sections 3663 and 3664 set forth the factors to be weighed in setting restitution in this case.